FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 8 1960
JAMES R. BROWNING, Clerk

No. 842

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES RUBBER COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Discussion	6
Conclusion	9
Appendix	10

CITATIONS

Cases:

Acme Breweries v. *Commissioner*, 15 T.C. 682	5
Atlas Foundry Co. v. *Commissioner*, 31 T.C. 623	5
Bradford Machine Tool Co. v. *Commissioner*, 260 F. 2d 950, certiorari denied, 359 U.S. 909	6, 7
Brown Paper Mill Co. v. *Commissioner*, 23 T.C. 47, review dismissed, 255 F. 2d 77, certiorari denied, 358 U.S. 906	5, 6, 7, 8
Central Bag Co. v. *Commissioner*, 27 T.C. 230	5
Clayton Coal Co. v. *Commissioner*, 27 T.C. 810	5
Crowell-Collier Pub. Co. v. *Commissioner*, 259 F. 2d 860, certiorari denied, 358 U.S. 928	6, 7
Dayton Rubber Co. v. *Commissioner*, 26 T.C. 389, affirmed, 249 F. 2d 2	5, 7
Dowd-Feder, Inc. v. *Commissioner*, 10 T.C. 345, affirmed, 173 F. 2d 673	5, 7
Helms Bakeries v. *Commissioner*, 23 T.C. 967, remanded, 236 F. 2d 3	5, 8
Helms Bakeries v. *Commissioner*, 263 F. 2d 642, certiorari denied, 360 U.S. 903	6, 7, 8

Cases—Continued

	Page
Laughlin, Homer, China Co. v. *Commissioner*, 7 T.C. 1325	5
Packer Pub. Co. v. *Commissioner*, 211 F. 2d 612	7
Stimson Mill Co. v. *Commissioner*, 7 T.C. 1065, affirmed, 163 F. 2d 269, certiorari denied, 332 U.S. 824	5, 7

Statute:

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Sec. 711(b)	7
Sec. 713	2, 5, 10
Sec. 713(a)	10
Sec. 713(b)	11
Sec. 713(d)	11
Sec. 713(e)	3
Sec. 713(f)	3, 12
Sec. 721	8
Sec. 722	2, 3, 5, 6, 8, 9, 13
Sec. 722(a)	2, 3, 4, 5, 6, 13
Sec. 722(b)	2, 3, 4, 8, 13
Sec. 722(d)	14
Sec. 732	2, 15
Sec. 732(c)	5, 6, 7, 8, 9, 16
Sec. 740	2, 16
Sec. 740(a)	16
Sec. 740(b)	16
Sec. 742	2, 5, 17
Sec. 742(a)	17
Sec. 742(b)	3, 18
Sec. 742(c)	18
Sec. 742(d)	18
Sec. 742(h)	2, 3, 4, 5, 18

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 842

UNITED STATES RUBBER COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (P.A. 2a–11a)[1] is reported at 29 T.C. 1268. The opinion of the Court of Appeals (Pet. A–1—A–6) is reported at 274 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1960. (Pet. A–7.) The petition for a writ of certiorari was filed on April 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

[1] "P.A." refers to petitioner's appendix in the court of appeals; "R.A." to respondent's.

QUESTION PRESENTED

Whether the Tax Court's denial of relief under Section 722 of the 1939 Internal Revenue Code may—notwithstanding the provision of Section 732(c) that the Tax Court's determination of any question "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court"—be reviewed with respect to the proper method of reconstruction of base period earnings under Section 722, or, more specifically, with respect to the taxpayer's contention that in arriving at its "constructive average base period net income" under Section 722(a) it was also entitled to the benefit of the so-called "growth formula" of Section 742(h), in addition to the appropriate adjustments for the items concededly qualifying for relief under Section 722 (b)(4).

STATUTE INVOLVED

The provisions of Section 732 of the 1939 Internal Revenue Code are set forth in the Appendix, *infra*, pp. 15–16, together with the pertinent portions of Sections 713, 722, 740 and 742 (pp. 10–15, 16–19).

STATEMENT

The taxpayer petitioned the Tax Court for redetermination of the Commissioner's disallowance of its applications for relief under Section 722 as to its excess profits taxes[1] for the years 1941 through 1945 (R.A. 93–98).

---

[1] Briefly, under the Second World War excess profits tax law, Section 710, *et seq.*, of the 1939 Code, a tax was imposed upon corporate profits in excess of a certain level or norm, called the "excess profits credit", deemed to represent the taxpayer's

In the Tax Court, the parties stipulated all of the facts and left for decision, in effect, only a narrow question as to the proper reconstruction of base period earnings under Section 722. (P.A. 2a–7a, 12a–27a; R.A. 98–101, Ex. 10–J following p. 101.) Taking the figures applicable to the taxable years 1943 through 1945 as illustrative, the arithmetic average of the taxpayer's actual base period earnings was $13,548,117.26. (P.A. 24a–25a.) The parties stipulated that there were two changes in the character of the taxpayer's business during the base period within the meaning of Section 722(b)(4), by reason of the taxpayer's acquisition of the assets of a competitor and by reason of a change in ratio of nonborrowed capital to total

---

"normal" profits. The credit, computed under Section 713 (or its counterpart applicable to taxpayers having qualifying subsidiaries, Section 742) was based on the taxpayer's (and its subsidiaries') average earnings during the "base period," 1936–1939. In determining the "average base period net income" on that method, two alternative automatic adjustments were provided: (1) under the "75% rule", the earnings of any year in the base period could be increased to 75% of the average for the other years (Sections 713(e) and 742(b)(2)); (2) under the "growth formula", an increased credit was allowed if the earnings for the last half of the base period were greater than those for the first half (Sections 713(f) and 742(h)).

In lieu of those automatic computation adjustments or benefits, the law further permitted "general relief"—in the case of a number of enumerated "abnormalities" or conditions—under Section 722 upon the basis of a *reconstruction* of base period earnings (specifically, upon the basis of a "constructive average base period net income", to be used "in lieu of the average base period net income otherwise determined"), if the taxpayer could establish that its base period income was not normal for any of the reasons specified in the statute and if it could establish "what would be a fair and just amount representing normal earnings." Section 722(a), Appendix, *infra*, p. 13.

capital, and that the respective amounts of $618,016.75 and $306,719.75 (aggregating $924,736.50) constituted appropriate adjustments (in arithmetic averages, for the four base period years) for those two changes in character. (P.A. 9a, 15a, 24a.) Adding the $924,736.50 aggregate adjustments for those changes to the $13,548,117.26 arithmetic average of the taxpayer's actual base period earnings would result in reconstructed average earnings of $14,472,853.76. (P.A. 9a, 24a.) By the application of the "growth formula" of Section 742(h) to the taxpayer's actual base period earnings, the "average base period net income" (or ABPNI) became $15,383,336.90.[3] (P.A. 24a–25a.)

The taxpayer contended, in substance, that, in arriving at its "constructive average base period net income" (or CABPNI) under Section 722(a), it was entitled to begin with the "growth formula" $15,383,336.90 amount of its ABPNI as computed under Section 742(h) and to add thereto the $924,736.50 aggregate adjustments (in arithmetic averages) stipulated as appropriate for the two Section 722(b)(4) grounds. (P.A. 5a–7a, 16a–17a.) The Commissioner's position was that the $924,736.50 aggregate for the two stipulated adjustments should be added only to the $13,548,117.26 average of the actual base period earnings and that, since that resulting amount ($14,472,853.76) was less than the $15,383,336.90 arrived at

[3] The taxpayer had been allowed a credit based upon the latter figure by the Commissioner, and the Tax Court did not disturb that allowance. (See R.A. 99–100 and Ex. 10 J following p. 101; P.A. 2a, 5a, 6a, 11a; Pet. A–5.)

under the "growth formula", the taxpayer was not entitled to any relief under Section 722. (P.A. 15a–16a, 24a.)

The Tax Court sustained the Commissioner's position, and denied the taxpayer any relief under Section 722 on the ground that a proper reconstruction of base period earnings under Section 722 resulted in an amount which was less than the amount already allowed to the taxpayer under the "growth formula" of Section 742(h). (P.A. 5a–11a.)[4] The Court of Appeals, taking the view that the question presented related solely to the proper method of reconstruction of base period earnings under Section 722, dismissed the petition for review, in observance of Section 732 (c). (Pet. A–2—A–6, A–7.)

---

[4] The Tax Court's holding was, we believe, clearly correct under the explicit provision of Section 722(a) that a CABPNI under Section 722 may be used only "in lieu of the average base period net income otherwise determined" under the excess profits tax subchapter. The Tax Court thus followed the principle, adhered to in a long line of decisions, to the effect that a taxpayer may not avail itself of both relief under Section 722 and the benefits of one of the automatic computation adjustments under Section 713 (or their counterparts under Section 742). See *Stimson Mill Co.* v. *Commissioner*, 7 T.C. 1065, affirmed, 163 F. 2d 269 (C.A. 9th), certiorari denied, 332 U.S. 824; *Homer Laughlin China Co.* v. *Commissioner*, 7 T.C. 1325; *Dowd-Feder, Inc.* v. *Commissioner*, 10 T.C. 345, affirmed, 173 F. 2d 673 (C.A. 6th); *Acme Breweries* v. *Commissioner*, 15 T.C. 682; *Dayton Rubber Co.* v. *Commissioner*, 26 T.C. 389, affirmed, 249 F. 2d 2 (C.A. 6th); *Central Bag Co.* v. *Commissioner*, 27 T.C. 230; *Clayton Coal Co.* v. *Commissioner*, 27 T.C. 810. See also *Helms Bakeries* v. *Commissioner*, 23 T.C. 967, 986–987, remanded on another ground, 236 F. 2d 3 (C.A. 9th); *Brown Paper Mill Co.* v. *Commissioner*, 23 T.C. 47, 63, review dismissed, 255 F. 2d 77, certiorari denied, 358 U.S. 906; *Atlas Foundry Co.* v. *Commissioner*, 31 T.C. 623.

DISCUSSION

1. The sole question in this case is whether the review sought by the taxpayer in the Court of Appeals was precluded by Section 732(c) of the Code (Appendix, *infra*, pp. 15–16).

In the Tax Court, the only issue raised (R.A. 94–96) was as to the right to relief under Section 722. The sole question ultimately presented by the parties to the Tax Court for decision was, as the Court of Appeals correctly pointed out (Pet. A–3—A–5), as to the proper reconstruction of base period earnings under Section 722—*i.e.*, the determination of the appropriate "constructive average base period net income" under Section 722(a) (Appendix, *infra*, p. 13). Since the determination of that question was plainly made "necessary solely by reason of * * * section 722", the Court of Appeals was clearly correct in holding that review was prevented by Section 732(c).

2. This case involves the same general question, as to the scope and effect of the prohibition of Section 732(c) against appellate review in Section 722 cases, as was presented in four cases in which petitions for writs of certiorari were denied at the last term of this Court. *Brown Paper Mill Co.* v. *Commissioner*, 225 F. 2d 77 (C.A. 5th), certiorari denied, 358 U.S. 906; *Crowell-Collier Pub. Co.* v. *Commissioner*, 259 F. 2d 860 (C.A. 2d), certiorari denied, 358 U.S. 928; *Bradford Machine Tool Co.* v. *Commissioner*, 260 F. 2d 950 (C.A. 6th), certiorari denied, 359 U.S. 909; *Helms Bakeries* v. *Commissioner*, 263 F. 2d 642 (C.A. 9th), certiorari denied, 360 U.S. 903.

Indeed, *Brown Paper, Crowell-Collier* and *Helms Bakeries* presented a much broader and more important aspect of the scope of the prohibition of Section 732(c) than the narrow and relatively less frequent problem presented in the instant case.

3. In the early days of the litigation involving World War II relief cases, the Ninth Circuit, in *Stimson Mill Co.* v. *Commissioner*, 163 F. 2d 269, certiorari denied, 332 U.S. 824, had reviewed a question similar to the one presented in this case, and shortly thereafter the Sixth Circuit, in *Dowd-Feder, Inc.* v. *Commissioner*, 173 F. 2d 673, had followed that view as to reviewability, though somewhat reluctantly.[5]

The conflict between the decision below and *Stimson Mill* and *Dowd-Feder*[6]—which conflict, recognized by the court below (Pet. A–6), is perhaps still subsisting (compare Pet. A–6 with Pet. 10, fn. 4)—must be acknowledged. We note, however, that with the elimination of the conflict existing at the time petitions for certiorari were before the Court in *Brown Paper,*

[5] The Sixth Circuit again reviewed a similar question much more recently, in *Dayton Rubber Co.* v. *Commissioner*, 249 F. 2d 2, but without discussion of the reviewability point.

[6] There is no further conflict, as asserted (Pet. 9–10) with *Packer Pub. Co.* v. *Commissioner*, 211 F. 2d 612 (C.A. 8th). Notwithstanding certain somewhat confusing comments appearing in that opinion, by way of dictum, all that the Eighth Circuit did there was to remand the case to the Tax Court to consider the right to relief under Section 711(b)(1)(J)—which the Tax Court apparently had not passed on because not timely raised.

Crowell-Collier and *Bradford Machine*[7]—which conflict went to matters of much wider scope and effect in the application of the prohibition of Section 732(c)—there is far less compelling need now for a definitive clarification by this Court as to the reach of the prohibition of Section 732(c).

4. The number of remaining World War II relief claims is rapidly diminishing.[8] Of the 83 cases involving Sections 721 and 722 docketed in the Tax Court as of March 23, 1960, to which the taxpayer refers (Pet. 11), only approximately half that number, we are advised, involve claims for Section 722 relief.[9] Moreover, the particular controversy as to the appropriate reconstruction under Section 722, involved in this case, constitutes only a small segment of the overall problems in Section 722 cases.

---

[7] That was the conflict with the Ninth Circuit's first decision in the *Helms* case as to the reviewability of an issue under Section 722(b)(4), *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3—since overruled by the Ninth Circuit itself in *Helms Bakeries* v. *Commissioner*, 283 F. 2d 642, certiorari denied, 360 U.S. 903.

[8] At the time the petition for certiorari in *Brown Paper* was before the Court at the last term, there were reported as pending between 240 and 265 cases, plus an undetermined number of cases in a certain category and of claims still at the administrative level. (See Memorandum for the Respondent in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, October Term, 1958, p. 14.) As of March 23, 1960, shortly before the filing of the petition in this case, only 83 cases were reported as docketed in the Tax Court. (Pet. 11.)

[9] Controversies as to the proper method of reconstruction, such as the one submitted to the Tax Court for decision in this case, can arise only in connection with claims for relief under Section 722—not under Section 721.

CONCLUSION

Although there is a perhaps still-subsisting conflict between the decision below and decisions of the Ninth and Sixth Circuits, as indicated, the particular point involved here is quite narrow and presents a much less common and less important aspect of the scope of the prohibition of Section 732(c) against appellate review in Section 722 cases than was presented in several cases which the Court recently declined to review. Under the circumstances, and particularly in view of the rapidly diminishing number of such World War II relief cases, the need for resolution or clarification by this Court does not appear to be compelling.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys.

JUNE 1960.

APPENDIX

Internal Revenue Code of 1939:

CHAPTER 1—INCOME TAX

* * * * *

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"]

PART I

* * * * *

SEC. 713 [as amended by Sec. 4 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 228(e)(2) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

* * * * *

(b) *Base Period.*—

(1) *Definition.*—As used in this section the term "base period"—

(A) If the corporation was in existence during the whole of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the period commencing with the beginning of its first taxable year beginning after December 31, 1935, and ending with the close of its last taxable year beginning before January 1, 1940; and

(B) In the case of a corporation which was in existence during only part of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the forty-eight months preceding the beginning of its first taxable year under this subchapter.

(2) *Division into halves.*—For the purposes of subsections (d) and (f), the base period of the taxpayer shall be divided into halves, the first half to be composed of one-half the entire number of months in the base period and to begin with the beginning of the base period.

* * * * *

(d) *Average Base Period Net Income—Determination.*—

(1) *Definition.*—For the purposes of this section the average base period net income of the taxpayer shall be the amount determined under subsection (e), subject to the exception that if the aggregate excess profits net income for the last half of its base period, reduced by the aggregate of the deficits in excess profits net income for such half, is greater than such aggregate so reduced for the first half, then the average base period net income shall be the amount determined under subsection (f), if greater than the amount determined under subsection (e).

* * * * *

(4) For the computation of average base period net income in the case of certain reorganizations, see section 742.

* * * * * *

(f) *Average Base Period Net Income—Increased Earnings in Last Half of Base Period.*—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing, for each of the taxable years of the taxpayer in its base period, the excess profits net income for such year, or the deficit in excess profits net income for such year;

(2) By computing for each half of the base period the aggregate of the excess profits net income for each of the taxable years in such half, reduced, if for one or more of such years there was a deficit in excess profits net income, by the sum of such deficits. * * *

(3) If the amount ascertained under paragraph (2) for the second half is greater than the amount ascertained for the first half, by dividing the difference by two;

(4) By adding the amount ascertained under paragraph (3) to the amount ascertained under paragraph (2) for the second half of the base period;

(5) By dividing the amount found under paragraph (4) by the number of months in the second half of the base period and by multiplying the result by twelve;

(6) The amount ascertained under paragraph (5) shall be the average base period net income determined under this subsection, except that the average base period net income determined under this subsection shall in no case be greater than the highest excess profits net income for any taxable year in the base period. * * *

* * * * * *

(26 U.S.C. 1952 ed., Sec. 713.)

* * * * * *

SEC. 722 [as amended by Sec. 222 of the Revenue Act of 1942, *supra*, and Sec. 1 of the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * * *

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished.

* * *

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by

regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 722.)

* * * * * *

SEC. 732 [as added by Sec. 9 of Excess Profits Tax Amendments of 1941, *supra,* and as amended by Sec. 222(c) of the Revenue Act of 1942, *supra,* by Sec. 2 of the Joint Resolution of June 30, 1945, c. 211, 59 Stat. 295, and by Sec. 203(a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) *Petition to Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with The Tax Court for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by the Tax Court in Case of Claim.*—If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Tax Court further finds that there is a deficiency for such year, the Tax Court shall

have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

(d) *Review by Special Division of the Tax Court.*—The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721(a)(2)(C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

(26 U.S.C. 1952 ed., Sec. 732.)

* * * * * * *

PART II—RULES IN CONNECTION WITH CERTAIN EXCHANGES

SUPPLEMENT A—EXCESS PROFITS CREDIT BASED ON INCOME

SEC. 740. DEFINITIONS.

For the purposes of this Supplement—

(a) *Acquiring Corporation.*—The term "acquiring corporation" means—

* * * * * * *

(b) *Component Corporation.*—The term "component corporation" means—

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 740.)

* * * * *

SEC. 742 [as amended by Sec. 228(c) of the Revenue Act of 1942, *supra*]. SUPPLEMENT A AVERAGE BASE PERIOD NET INCOME.

In the case of a taxpayer which is an acquiring corporation, its average base period net income (for the purpose of the credit computed under section 713) shall be the amount computed under section 713 or the amount of its Supplement A average base period net income, whichever is the greater. The Supplement A average base period net income shall be the amount computed without regard to subsection (h) of this section, or computed under subsection (h) of this section, whichever is the greater. The Supplement A average base period net income shall be computed as follows:

(a) By ascertaining with respect to each of its base period years—

(1) The amount of its and each of its component corporation's excess profits net income for each of its and such component corporation's taxable years beginning with or within such base period year; or, in the case of each such taxable year of the taxpayer or of such component corporation, as the case may be, in which the deductions plus the credit for dividends received and the credit provided in section 26(a) (relating to interest on certain obligations of the United States and its instrumentalities) exceeded the gross income, the amount of such excess;

(2) (A) The aggregate of the amounts of excess profits net income ascertained under paragraph (1); (B) the aggregate of the excesses ascertained under paragraph (1); and (C) the difference between the aggregates found under clause (A) and clause (B). If the aggregate ascertained under clause (A) is greater than the aggregate ascertained under clause (B), the difference shall for the purposes of

subsection (b) be designated a "plus amount", and if the aggregate ascertained under clause (B) is greater than the aggregate found under clause (A), the difference shall for the purposes of subsection (b) be designated a "minus amount".

* * * * *

(b) By adding the plus amounts ascertained under subsection (a)(2) for each year of the base period; and

(1) If the tax under this subchapter is being computed for a taxable year not beginning after December 31, 1941, by subtracting from such sum, if for two or more years of the basis period there was a minus amount, the sum of the minus amounts, excluding the greatest; or

(2) If the tax under this subchapter is being computed for a taxable year beginning after December 31, 1941, by subtracting from such sum the sum of the minus amounts. If the amount used under the preceding sentence for the lowest year is less than 75 per centum of the sum of the plus amounts reduced by the sum of the minus amounts for the other years in the base period divided by three, the amount which shall be used for such lowest year shall be 75 per centum of the amount last ascertained.

(c) By dividing the amount ascertained under subsection (b) by four.

(d) In no case shall the average base period net income be less than zero. * * *

* * * * *

(h) *Increased Earnings in Last Half of Base Period.*—

(1) *General rule.*—The Supplement A average base period net income determined under this subsection shall be computed by ascertaining for each half of the base period the sum of the plus amounts determined under subsection (a) reduced if for any year in such half a

minus amount was determined by the minus amount for such year. If the amount ascertained for the second half exceeds the amount ascertained for the first half, the Supplement A average base period net income shall be the sum, divided by two, of the amount so ascertained for the second half plus one-half of such excess, except that it shall not exceed the largest plus amount determined under subsection (a) with respect to any base period year.

* * * * *

(26 U.S.C. 1952 ed., Sec. 742.)

U.S. GOVERNMENT PRINTING OFFICE: 1960